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# The Clinton Impeachment Indicates a Presidential Impeachable Offense is Only Limited by Constitutional Process and Congress' Political Compass Directive

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# **ESSAY: THE CLINTON IMPEACHMENT INDICATES A PRESIDENTIAL IMPEACHABLE OFFENSE IS ONLY LIMITED BY CONSTITUTIONAL PROCESS AND CONGRESS' POLITICAL COMPASS DIRECTIVE**

L. Darnell Weeden<sup>†</sup>

I. INTRODUCTION .....	2499
II. HISTORICAL DEVELOPMENT OF HIGH CRIMES AND MISDEMEANORS AS POLITICAL AMMUNITION .....	2504
III. CONGRESS' BROAD CONSTITUTIONAL POWER TO IMPEACH THE PRESIDENT IS LIMITED BY ITS POLITICAL COMPASS OF SELF-INTEREST .....	2505
A. <i>Presidential Impeachable Offenses Cause Injury To         The Nation's Political Compass</i> .....	2506
B. <i>A Partisan Political Compass To Impeach A President         Is Fatal To An Impeachment Proceeding</i> .....	2507
C. <i>Articles Of Impeachment Against A President May Be         Checked By The Popular Political Compass Against         Impeachment</i> .....	2511
IV. CLINTON'S IMPEACHMENT LEGACY IS THE EXPANSIVE INTERPRETATION GIVEN IMPEACHABLE OFFENSES UNDER THE "OTHER HIGH CRIMES AND MISDEMEANORS" LANGUAGE OF THE CONSTITUTION .....	2515
V. CONGRESS' POLITICAL COMPASS AS DRIVEN BY SELF-INTEREST DETERMINES THE FATE OF AN IMPEACHMENT PROCEEDING .....	2518
VI. CONCLUSION .....	2523

## **I. INTRODUCTION**

What type of political compass directive justifies presidential

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impeachment and removal from office upon conviction? Under the Constitution, "[t]he President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors."<sup>1</sup>

The nature of the offenses that are impeachable is a continuing source of controversy among commentators.<sup>2</sup> Constitutional scholar Michael Gerhardt does not think very highly of most of the literature on the impeachment process.<sup>3</sup> Bob Barr, a member of the U.S. House of Representatives (Georgia), believes any violation of public trust is an impeachable offense.<sup>4</sup> Typically impeachment defendants assert that they are entitled to due process or other rights traditionally protected in the criminal process.<sup>5</sup> One reason impeachment defendants argue for certain procedural rights guaranteed under the Constitution is because no court has decided, with authority, the degree to which the Bill of Criminal Procedural Guarantees applies to impeachment.<sup>6</sup> The debate surrounding whether the proper process for an impeachment proceeding is criminal procedure is not new.<sup>7</sup> Lawyers, politicians, commentators and others have debated the criminal nature of the impeachment process without resolving the question.<sup>8</sup>

The impeachment process debate has historically concentrated on whether an impeachable offense is limited to any crime, or if it includes non-criminal offenses and fiduciary breaches as well.<sup>9</sup> William Blackstone's highly respected eighteenth century

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1. U.S. CONST. art. II, § 4.

2. Michael J. Gerhardt, *The Constitutional Limits to Impeachment and its Alternatives*, 68 TEX. L. REV. 1, 5 (1989).

3. *Id.* at 4-5. "Given all the attention and importance attached to the impeachment process from the inception of our Republic to the present, it is surprising that the literature on impeachment—split primarily between the formalist and informalist approaches—is, with few exceptions, unenlightening and unimpressive." *Id.*

4. Bob Barr, *High Crimes and Misdemeanors: The Clinton-Gore Scandals and the Question of Impeachment*, 2 TEX. REV. L. & POL. 1, 4-5 (1997).

5. Buckner F. Melton, Jr., *Federal Impeachment And Criminal Procedure: The Framers' Intent*, 52 MD. L. REV. 437, 438 (1993). *E.g.*, Nixon v. United States, 506 U.S. 224, 234 (1993); Hastings v. United States Senate, 887 F.2d 332, Nos. 89-5188, 81-5191, 1989 WL 122685 (D.C. Cir. 1989) (unpublished disposition).

6. Melton, *supra* note 5, at 438.

7. *Id.* at 438-39.

8. *Id.* at 439.

9. *Id.*

commentaries, which were contemporaneous with the Constitutional Convention, take the position that a peer may be impeached for any crime.<sup>10</sup> Raoul Berger has taken an expansive view of the basis for an impeachable offense.<sup>11</sup> Berger has generally been identified with the position that impeachable offenses are not limited to indictable criminal offenses.<sup>12</sup> Other commentators do not agree with Berger's impeachable offense rationale.<sup>13</sup> Unlike Berger, Theodore Dwight believes that an impeachable offense must not only be a crime but a specific type of crime.<sup>14</sup> According to Dwight, any impeachable crime not specifically named in the United States Constitution can only be cause for impeachment if committed against the statutory laws of the United States.<sup>15</sup> Dwight believes impeachable offenses are limited to federal crimes.<sup>16</sup> Blackstone thinks any crime is an adequate basis for an impeachment proceeding.<sup>17</sup> In 1974, the House Judiciary Committee came to the conclusion that an impeachable offense is not limited to crimes.<sup>18</sup> Professor Ronald D. Rotunda, a constitutional law scholar, believes that just because the Constitution says impeachment includes treason, bribery and other high crimes and misdemeanors does not limit impeachment to criminal offenses.<sup>19</sup> According to Congressman Barr, criminality has never been treated as a necessary element of the impeachment process.<sup>20</sup>

Once again it is both necessary and proper for discussing the constitutional implications of Presidential impeachment because the Monica Lewinsky scandal has made impeachment a hot consti-

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10. *Id.* at 457 n.12 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 258-61 (1783)).

11. *Id.* at 457 n.12 (citing RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 7-52 (1973)).

12. *Id.*

13. *Id.* at 439 n.13.

14. *Id.* at 457 n.12 (citing Theodore W. Dwight, *Trial by Impeachment*, 15 AM. L. REG. 257, 269 (1867)).

15. *Id.* at 457 n.13

16. *Id.*

17. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 259-60).

18. STAFF OF HOUSE COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 22-25 (Comm. Print 1974) ("[I]mpeachable conduct need not be criminal").

19. Ronald D. Rotunda, *Symposium, On Judicial Discipline and Impeachment: An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 721-28 (1987-88).

20. Barr, *supra* note 4, at 14.

tutional and political item.<sup>21</sup>

On October 8, 1998, the United States House of Representatives started formal debate on House Resolution 581, authorizing the Committee on the Judiciary to "[i]nvestigate whether sufficient grounds exist for the impeachment of William Jefferson Clinton, President of the United States."<sup>22</sup> A number of years ago, Professor Rotunda once said that it is an appropriate time "for discussing the federal law of impeachment because impeachment is not currently a part of our daily news diet."<sup>23</sup>

Because the impeachment issue was recently a part of the daily news media and national conscience, we must engage in proper constitutional scrutiny to decide the issue on the basis of constitutional principle rather than result-oriented thinking.<sup>24</sup>

In impeachment proceedings against Supreme Court Justice William O. Douglas, then House Minority Leader Representative Gerald Ford concluded that an impeachable offense under the Constitution, "is whatever a majority of the House of Representatives considers it to be at a given moment in history."<sup>25</sup> Representative Ford's comments, indicating a broad scope of judicial impeachment, have been subjected to criticism.<sup>26</sup> At the end of the

21. Daniel Casse, *How the GOP Can Distinguish Itself*, WALL ST. J., Nov. 4, 1998, at A22.

Impeachment proceedings are obviously the most immediate item on the GOP agenda. By January, we will likely have a yea or nay vote on whether to remove the president from office .... Contempt for Mr. Clinton's behavior, by itself, did not provide sufficient fuel to power the '98 campaign. It will not be enough to carry the party through 2000. But shaping the agenda at a time when it is hard to tell Democratic television ads from Republican ones is a challenge .... Even the Monica Lewinsky scandal may have, paradoxically, dulled the Republican edge on moral leadership, long a GOP advantage. While Mr. Clinton has thus far shown that it is possible to behave immorally and lie under oath yet still keep your job, that is not a lesson Democrats will likely take to heart. After Monica, Democrats will no longer be able to argue, as so many once did, that character doesn't matter, and will thus join sides with the Republicans on this issue as well.

*Id.*

22. 144 CONG. REC. H1005-02 (1998).

23. Rotunda, *supra* note 19, at 707.

24. *Id.* "The time is particularly appropriate for discussing the federal law of impeachment because impeachment is not currently a part of our daily news diet ... We can thus discuss this issue calmly, without the pressures, either conscious or subconscious, of result-oriented thinking." *Id.*

25. 116 CONG. REC. 11,912 (1970) (statement of Rep. Gerald Ford).

26. Barr, *supra* note 4, at 10. See also BERGER, *supra* note 11, at 53-54.

impeachment day, an impeachable offense is defined by the political realities of an appropriate majority of the members of Congress and all the Constitution requires is that the important decision be justified as a serious political offense. The Constitution allows the President to be at risk of impeachment for any political, criminal or civil offense serious enough to offend the political compass of an adequate majority in the United States House of Representatives. If the President offends the political compass of America enough for Congress to start impeachment proceedings, the following steps will be taken. First, the impeachment proceeding will start in the House of Representatives, because only the House can bring charges against the President for an alleged offense.<sup>27</sup> Second, if a simple majority of the House votes to approve the charges against the President, the Senate has the singular responsibility to grant the President a trial on the charges.<sup>28</sup> After the Senate receives the articles of impeachment from the House, the articles are served on the President in the form of a subpoena.<sup>29</sup> A presidential impeachment trial is presided over by the Chief Justice of the United States Supreme Court.<sup>30</sup> During the impeachment trial, the President may attend with legal counsel in order to present witnesses and evidence in support of his challenge to the impeachment charges.<sup>31</sup> It is the job of the House Managers to present the specific charges against the President at the trial.<sup>32</sup> At the trial, a separate vote is taken on each of the specific charges in order to allow the President's lawyers to take attention away from any pattern of impeachable conduct.<sup>33</sup> If two-thirds of the Senate<sup>34</sup> who are present vote to convict the President on each article of impeachment,<sup>35</sup> he will be removed from office.

Part I of this article provides a brief introduction to the impeachable offense controversy.<sup>36</sup> Part II discusses the historical de-

27. U.S. CONST. art. I, § 2, cl. 5.

28. *Id.* § 3, cl. 6.

29. S. Rep. No. 99-33, at 3 (1986).

30. U.S. CONST. art. I, § 3, cl. 6.

31. S. REP. NO. 99-33, at 69-72 (1986).

32. Richard M. Pious, *The Presidency: Twenty-Five Years After Watergate: Impeaching the President: The Intersection of Constitutional and Popular Law*, 43 ST. LOUIS U. L.J. 859, 864 (1999).

33. *Id.*

34. In a Senate of 100, the majority of Senate votes are needed for conviction.

35. U.S. CONST. art. I, § 3, cl. 6.

36. *Supra* Part I.

velopment of the high crime and misdemeanor concept as political ammunition.<sup>37</sup> Part III articulates the analysis that Congress' broad constitutional power to impeach the President is limited by its political self-interest compass.<sup>38</sup> Part IV examines Clinton's impeachment legacy as an expansive interpretation of impeachable offenses under the other high crimes and misdemeanors language of the Constitution.<sup>39</sup> Part V discusses the congressional political compass self-interest directive.<sup>40</sup> Finally, the article draws the conclusion that the Senate read the political compass tea leaves and resolved that the President's inappropriate sexual behavior did not merit conviction and removal from office.

## II. HISTORICAL DEVELOPMENT OF HIGH CRIMES AND MISDEMEANORS AS POLITICAL AMMUNITION

It is generally believed that the authors of the United States Constitution followed the British procedure for impeachment with significant modifications.<sup>41</sup> The American modifications to the British impeachment process were designed to avoid or retard the common practice in England of using the impeachment process as a weapon of political warfare.<sup>42</sup> Some believe the radical Republican majority in the House of Representatives ignored the intent of the founding fathers and impeached President Andrew Johnson for political motives in 1868.<sup>43</sup> During President Johnson's impeachment trial, Senator Charles Sumner said, "this proceeding is political in character with a political object."<sup>44</sup> Others contend that the Johnson impeachment trial vote in the United States Senate established beyond question under the Constitution that impeachment is judicial in nature rather than political.<sup>45</sup> President Johnson's acquittal of impeachable offenses represents radical Republicans failing by one vote to remove a President from office for political reasons under a constitutionally permissible process. Once the House

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37. *Infra* Part II.

38. *Infra* Part III.

39. *Infra* Part IV.

40. *Infra* Part V.

41. Gerhardt, *supra* note 2, at 82; Milton Lomask, *The American Presidency*, at <http://www.gi.grolier.com/presidents/ea/side/impeach.html>.

42. Lomask, *supra* note 41.

43. *Id.*

44. *Id.*

45. *Id.*

impeaches the President, the Senate is required to place the President on trial for the impeachable offense with a two-thirds majority vote necessary for conviction.<sup>46</sup> For all practical purposes, the constitutional definition of an impeachable offense is to be decided by the United States Congress.<sup>47</sup> In defining an impeachable offense, the Congress may not use its power in an arbitrary manner.<sup>48</sup> At the very start of this country's history, impeachment was identified with moments of political crisis and partisan political rivalry.<sup>49</sup>

The only historical barrier to have really applied to the impeachable offense concept is the political climate at any time in history.<sup>50</sup> History reveals that impeachment may be motivated by politics and, as a matter of practical reality, is usually resolved by politics.<sup>51</sup> There are no impartial analyses by the Congress of impeachable offenses free of political motives. There have been many attempts to limit the influence of politics in defining the bounds of an impeachable offense.<sup>52</sup>

### III. CONGRESS' BROAD CONSTITUTIONAL POWER TO IMPEACH THE PRESIDENT IS LIMITED BY ITS POLITICAL COMPASS OF SELF-INTEREST

Former President Gerald Ford, while serving in Congress in 1970, raised the critical question of what constitutes an impeachable offense in contemporary America.<sup>53</sup> In answer to his own question, Congressman Ford suggested that either a federal judge or a President may be convicted of any impeachable offense that two-thirds of the Senate considers serious enough to compel removal of the guilty party from office.<sup>54</sup> Ford's statement about Congress' broad-based political power basis for an impeachable offense expresses the reality of impeachment far more closely than his critics do.<sup>55</sup>

It is believed that Ford's desire for the impeachment of Justice

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46. U.S. CONST. art. I § 3, cl. 6.

47. Rotunda, *supra* note 19, at 727.

48. *Id.*

49. PETER C. HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA 1803-05 (1984).

50. Gerhardt, *supra* note 2, at 82.

51. *Id.*

52. *Id.* at 82-3.

53. 116 CONG. REC. 11,913 (1970) (statement of Rep. Gerald Ford).

54. *Id.*

55. *Id.*; see also Gerhardt, *supra* note 2, at 82.



Douglas was inspired by political retaliation because the Senate failed to confirm two of President Nixon's nominees to the United States Supreme Court.<sup>56</sup> Our founding fathers at the Constitutional Convention understood impeachment as a political proceeding with the accused being charged with a political crime.<sup>57</sup> It was a consensus at the Constitutional Convention that the President could only be impeached and removed for political crimes, which constituted great offenses.<sup>58</sup>

A. *Presidential Impeachable Offenses Cause Injury To The Nation's Political Compass*

An impeachable offense is any offense that causes great injury to the nation's political compass as determined by an appropriate majority of Congress.<sup>59</sup> One scholar has described constitutional law "as a process by which each generation gives formal expression to the values it holds fundamental in the operations of government."<sup>60</sup> An impeachable offense may properly be described as any harm to the political compass of the community by which each generation gives expression to the values it holds fundamental in the President of the United States.<sup>61</sup>

Only weeks before the 1998 congressional elections, the Republican Party impeachment political compass indicated that it would be politically popular to impeach President Bill Clinton because of the Lewinsky scandal.<sup>62</sup> Disappointed by their election set-

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56. Melissa H. Maxman, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420, 444 n.135 (1987).

57. Gerhardt, *supra* note 2, at 84.

58. *Id.* at 84.

59. BERGER, *supra* note 11, at 88. James Iredell, who would later serve on the Supreme Court, stated during the constitutional ratification process that impeachment could occur from any great injury to the community. *Id.* (citation omitted).

60. Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1068 (1981).

61. *Id.* at 1069.

62. Bennett Roth, *Election Aftermath/The Nation/GOP Says it Missed its Wave by Keeping Focus on Scandal*, HOUS. CHRON., Nov. 5, 1998, at 1A, available at 1998 WL 16780519. Roth stated:

In the aftermath of unexpected midterm election losses, Republicans on Wednesday conceded that they had offered voters a muddled message and failed to do as good a job as the Democrats in turning out their core supporters .... Furthermore, it became clear that the scandal involving President Clinton, which the GOP once hoped to ride to greater victo-

setback, House Republicans initially indicated they would scale down their impeachment investigation of President Clinton and announced plans to publicly question only one witness, independent counsel Kenneth Starr.<sup>63</sup> House Judiciary Committee Chairman, Henry Hyde, Republican (IL), panel investigated whether President Clinton illegally tried to hide his affair with Lewinsky, justifying impeachment.<sup>64</sup> Hyde talked with Republican members of his panel and announced the downsized investigation.<sup>65</sup> Hyde's remarks were made two days after his party lost five house seats in the midterm election, giving the Republicans a smaller majority.<sup>66</sup>

Republicans, who ran ads asking voters not to reward Clinton's behavior by electing Democrats, had earlier forecast a double-digit gain. Hyde denied the voting played a role in the decision to speed up his hearings and cited opinion polls showing impeachment ranked low among voter concerns. Those same surveys, however, found six of every ten voters saying they wanted the impeachment inquiry dropped. In Houston, Senator Kay Bailey Hutchison, Republican (TX), said the election might make impeachment less certain. "I think that the House was certainly going toward articles of impeachment, and I just don't know if that has changed."<sup>67</sup>

#### B. *A Partisan Political Compass To Impeach A President Is Fatal To An Impeachment Proceeding*

The majority of voters clearly indicated in the electoral process that they wanted the impeachment charges against Clinton dropped, but congressional Republicans did not understand the

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ries, did not work in their favor, with exit polls showing that most voters did not believe that the President's behavior was relevant to their election selections .... [John] Linder [R-Ga.] acknowledged that Republicans failed to articulate compelling issues in a year when Clinton's affair with Monica Lewinsky dominated media attention .... 'The Clinton scandals became a filter through which we could not penetrate with a clear message about what the Republican majority has achieved in a remarkably short time,' ... said [Jim Nicholson, chairman of the Republican National Committee].

*Id.*

63. John C. Henry, *Only Witness Panel Will Call: Kenneth Star/Republicans Move to Cut Time Spent on Impeachment Probe*, HOUS. CHRON., Nov. 6, 1998, at 1A.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 16A.

political winds of the no-impeachment voters and pondered what would happen next.<sup>68</sup> One significant pattern in an impeachment proceeding is the congressional pressure to find a non-partisan basis for the impeachment decision.<sup>69</sup>

On December 19, 1998, the House of Representatives passed two articles of impeachment against President Clinton.<sup>70</sup> The first article of impeachment alleged that President Clinton committed perjury in his August 17, 1998, grand jury testimony, and the second alleged that he obstructed justice.<sup>71</sup> The impeachment vote was primarily a partisan vote along party lines with a small number of defectors.<sup>72</sup>

Commentators immediately characterized the impeachment vote against Clinton as partisan politics.<sup>73</sup> Republicans supporting the impeachment vote were described as out of touch with the world outside the beltway and the standards of fair play that still exist in America.<sup>74</sup> Republicans claimed they were voting for impeachment based on evidence in the Judiciary Committee Report.<sup>75</sup> At least forty Republicans were accused of considering evidence not contained in the Judiciary Report because they visited a congressional office to look at materials containing unsubstantiated allegations discovered by Kenneth Starr about Clinton's relations with women other than Lewinsky.<sup>76</sup> With the House impeachment vote, Clinton made history by becoming the second President to ever be impeached.<sup>77</sup> During the Clinton impeachment, "vote margins were razor thin and sharply partisan."<sup>78</sup> Only five Democrats joined the House Republicans in passing the two articles of

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68. *Id.*

69. Michael J. Gerhardt, *The Presidency: Twenty-Five Years After Watergate Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 928 (1999).

70. *Special Report: The Vote to Impeach*, NEWSWEEK, Dec. 28, 1998/Jan. 4, 1999, at 30.

71. *Id.*

72. *Id.*

73. Howard Fineman & Debra Rosenberg, *Special Report: Washington at War*, NEWSWEEK, Dec. 28, 1998/Jan. 4, 1999, at 34, 36.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 34. Clinton was impeached one year after Monica Lewinsky received a subpoena to testify in the Paula Jones case. *Id.* It is believed that the Paula Jones subpoena was the event leading to Clinton's impeachment. *Id.*

78. *Id.*

impeachment.<sup>79</sup> At the start of the Clinton impeachment debate, Democratic House leader Dick Gephardt said, “[t]he politics of smear and slash-and-burn must end.”<sup>80</sup> Gephardt’s comments received a bipartisan standing ovation.<sup>81</sup> However, immediately after the ovation, the partisan impeachment politics of smear and slash-and-burn resumed.<sup>82</sup>

From a historical perspective, Alexander Hamilton recognized that the impeachment process could begin as a partisan event but that an impeachment vote should never be taken on a partisan political basis.<sup>83</sup> Hamilton advised that by the conclusion of the impeachment process, members of Congress should reach a nonpartisan decision about the nature and goal of the impeachment hearings.<sup>84</sup> An impeachment proceeding is considered nonpartisan when a decision is reached which has the support of “all right thinking men.”<sup>85</sup>

The Clinton impeachment proceedings are likely to be viewed very harshly by history because of its highly partisan nature from start to finish.<sup>86</sup> The day after the Clinton impeachment acquittal, there was an immediate rush to judgment condemning the impeachment proceedings as a partisan, political failure. “It may have been a case doomed from the beginning, tainted as it was by parti-

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79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Gerhardt, *supra* note 69, at 928. See THE FEDERALIST No. 65, at 365 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

84. Gerhardt, *supra* note 69, at 929.

85. *Id.*; 144 CONG. REC. H11, 968-03, H12, 011 (daily ed. Dec. 19, 1998).

86. Gerhardt, *supra* note 69, at 929-30.

In other words, congressional practices reflect the judgment that the Constitution envisions that impeachment should not be used to punish or retaliate against impeachable officials, such as the President and federal judges, because of their opinions, policy differences, or innocent errors of judgment. Nor should impeachment be used for largely partisan purposes; hence, some senators refused to convict Associate Justice Samuel Chase or President Andrew Johnson for fear that if either were removed, future presidents or judges from their party would likely be punished in the impeachment process just by virtue of their party affiliation. Rather, impeachment generally should be deployed against impeachable officials for having engaged in some misconduct that (1) has caused some serious injury to the republic or to the constitutional system and (2) has a nexus with the official’s formal duties.

*Id.*

sanship, prejudice, politics and an overwhelming lack of public support for conviction."<sup>87</sup> On Friday, February 12, 1999, the United States Senate acquitted President Clinton of perjury and obstruction of justice charges, ending an orchestrated Republican effort to drive him from office.<sup>88</sup> The Senate's rejection of both articles of impeachment was a severe disapproval of the Republican effort to oust the President.<sup>89</sup> The abandoned articles of impeachment were a direct result of the President's affair with former White House intern, Monica Lewinsky, and his alleged effort to cover up the relationship.<sup>90</sup> Clinton's impeachment acquittal was an extremely partisan vote along political lines. On the perjury charge, not a single Democratic Senator out of forty-five Democrats voted to convict the President while only ten Republican Senators voted the President not guilty.<sup>91</sup> However, forty-five Republicans voted the President guilty on the perjury charge.<sup>92</sup> On the obstruction of justice charge, forty-five Democrats and five Republicans found the President not guilty.<sup>93</sup> In comparison, fifty Republicans voted to convict the President in the obstruction of justice article of impeachment.<sup>94</sup> On the obstruction of justice charge, the Republicans voted in a

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87. Tony Freemantle & John C. Henry, *House Prosecutors' Case Seemed "Doomed From the Beginning,"* HOUS. CHRON., Feb. 13, 1999, at 19A.

It may have been that the case alleging that President Clinton lied under oath and obstructed justice was a difficult one to prosecute, even absent the politics. It may have been, as was suggested by opposing counsel, that the thirteen House Republicans who acted as the President's prosecutors simply wanted to win badly. Or, according to a sampling of prominent defense lawyers, legal scholars and politicians, it may have been that the House prosecutors lost their case against the President Friday because of all of the above.

*Id.*

88. John C. Henry, *Clinton Acquitted: Votes Fail as History Plays Out in Senate,* HOUS. CHRON., Feb. 13, 1999, at 1A.

89. *Id.*

90. *Id.*

It also signaled that U.S. presidents are not easily deposed. In the only previous impeachment trial of a president 131 years ago, Andrew Johnson was acquitted by one vote. While neither charge against Clinton mustered a simple 51-vote majority, much less the two-thirds needed for the Senate to convict him, the President is forever paired with Johnson as the nation's only impeached presidents.

*Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

ten-to-one margin to convict the President in a highly charged, partisan atmosphere.<sup>95</sup>

The day after the Clinton impeachment vote, House Judiciary Committee Chairman Henry Hyde, an Illinois Republican who served as Chief House Prosecutor during Clinton's Senate trial, said that he had no regrets about the verdict because "Congress had fulfilled [its] oath of office to discharge [its] duty according to the Constitution."<sup>96</sup> Alexander Hamilton would probably disagree with Hyde's suggestion that the House members voting to impeach the President performed their duty well because history ultimately requires a non-partisan basis for impeaching President Clinton.<sup>97</sup> The impeachment proceedings became so politically partisan that some commentators stated the day after the Clinton acquittal that the outcome of the impeachment trial was never in doubt, even before the House passed the articles of impeachment.<sup>98</sup>

*C. Articles Of Impeachment Against A President May Be Checked By The Popular Political Compass Against Impeachment*

The recent unsuccessful attempt to remove President Clinton from office through the impeachment process teaches us that any congressional allegations of serious breaches of the public trust are be guided by popular sentiment against impeaching a president.

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95. *Id.*

96. *Id.* at 18A.

97. Gerhard, *supra* note 69, at 928.

Yet another significant pattern in impeachment proceedings is that as the latter unfold members of Congress increasingly feel the pressure to find some non-partisan basis for their decisions that will withstand the test of time. This pressure comes from the increasing awareness that the legitimacy of their decisionmaking will depend largely on the judgment of history. In Federalist Number Sixty-Five, Alexander Hamilton warned that impeachments would often begin in a partisan atmosphere. Consequently, Hamilton counseled, the further along an impeachment proceeded the more members of Congress needed to find a non-partisan basis on which to resolve the proceedings.

*Id.*

98. Henry, *supra* note 88, at 18A.

Well before the House passed the articles of impeachment in mid-December, the outcome of the trial was never in doubt. Clinton had enough allies among the Senate Democrats to secure the thirty-four votes needed to block conviction and removal. His acquittal was assured Jan. 27 when forty-four Democrats voted to dismiss the charges and end the trial.

*Id.*

Less than a week before the Senate voted that President Clinton was not guilty of committing any impeachable offenses, commentators reported that America is "deeply tired ... of the Lewinsky affair and the resulting impeachment mess."<sup>99</sup> By deciding to support President Clinton in his battle against impeachment, the public was really supporting political proportionality in the electoral Democratic process.<sup>100</sup> The public saw the zealous efforts by Republican House prosecutors to convict the President of an impeachable offense as an effort to reverse the results of a presidential election to be more problematic than the President's conduct.<sup>101</sup> The Republican cure of impeaching Clinton was more politically offensive to the voting public than was Clinton's political disease in the Lewinsky affair.<sup>102</sup> Professor Pollitt stated, prior to the impeachment vote, that an impeachment would not be successful if the House members simply responded to public sentiment.<sup>103</sup> Days before the Senate vote of not guilty on the impeachment charges, a *Newsweek* poll indicated only twenty-eight percent of Americans thought President Clinton should be removed from office.<sup>104</sup> The *Newsweek* poll also revealed fifty-four percent of Americans believed that the Republican Party was hurt by the manner in which the impeachment proceeding was handled on Capitol Hill.<sup>105</sup> A mere nine percent of Americans believed the Republicans were helped by the impeachment proceeding in the poll.<sup>106</sup>

A few days before the Senate vote in the impeachment pro-

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99. Jonathan Alter, *National Affairs, The Fallout*, NEWSWEEK, Feb. 8, 1999, at 28.

100. *Id.* at 30.

101. *Id.* at 28.

102. *Id.* at 30. President Clinton was deposed in the Paula Jones case on January 17, 1998, during which he denied an affair with former White House intern, Monica Lewinsky. *Id.* The President repeated this denial to a nationwide audience on January 21 and again on January 27. *Id.* Six months later the President told a nationwide audience, and then a grand jury, 'I did have a relationship with Ms. Lewinsky that was not appropriate. In fact, it was wrong.' *Id.* Following months of investigation, on September 9, independent counsel Kenneth Starr sent a report to Congress alleging information that could constitute grounds for impeachment: perjury, subornation of perjury, and obstruction of justice arising from Clinton's actions in trying to conceal his relationship with the former intern. *Id.* See also Daniel Pollitt, *Sex In The Oval Office and Cover-Up Under Oath: Impeachable Offense?*, 77 N.C. L. REV. 259, 259-60 (1998).

103. Alter, *supra* note 99, at 30.

104. Evan Thomas & Mark Hosenball, *National Affairs, The Endgame (Bill Clinton Impeachment Trial Nears the End)*, NEWSWEEK, Feb. 8, 1999, at 22, 24.

105. *Id.* at 26.

106. *Id.*

ceeding, it finally became clear, even to the Republicans, that the Clinton impeachment trial had become "pure theater."<sup>107</sup> News reports stated there was no real chance that the President would be removed from office.<sup>108</sup> In order to convict the President of an impeachable offense, sixty-seven out of 100 Senators would have to vote to convict.<sup>109</sup> Prior to the vote to acquit the President, forty-four Senators had voted to dismiss the impeachable offenses against the President.<sup>110</sup> The only real issue prior to the Senate vote on the impeachment charges was who would come out looking worse: the President for seducing Monica Lewinsky, a young intern, and attempting to cover it up, or the Republicans for prolonging the scandal.<sup>111</sup> In the days just before the Senate vote in the impeachment proceedings, behind the scenes, it was not about removing the President, but "about dishing dirt and posturing for history."<sup>112</sup> In the last week of the impeachment proceedings most Americans could only wonder why the impeachment proceedings were still going on.<sup>113</sup> The answer lies partly in the egos of political partisans.<sup>114</sup> A number of conservative Republican Senators up for re-election in the upcoming year of 2000 supported the impeachment show trial in order to satisfy the Republican right-wing base and promote Republican Party unity.<sup>115</sup> The Clinton impeachment proceeding pretrial negotiations in the Senate had very little to do with Clinton's innocence or guilt.<sup>116</sup> The pretrial negotiations were perceived to address the real stakes of how voters and history would treat Clinton's accusers and defenders and the future impact of the proceedings on American life and politics.<sup>117</sup>

In the final analysis, the Senate's failure to convict President Clinton of any impeachable offenses made America's 210-year-old constitutional process a real winner.<sup>118</sup> The Senate vote simply mir-

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107. *Id.* at 22.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 24.

116. *Id.*

117. *Id.*

118. Cragg Hines, *Process was Painful, Not Perilous*, HOUS. CHRON., Feb.13, 1999, at 1A.



rored the popular will of most Americans that the President's post-juvenile sexual indiscretions and cover-up attempts with a woman young enough to be his daughter were not a basis to remove him from office.<sup>119</sup> The impeachment process was not pretty because any contemplation by Congress of overturning the electoral will of the people should arouse a passionate response.<sup>120</sup> The polling immediately after the impeachment proceedings suggests that Americans will bring vengeance upon the Republicans for sponsoring and endorsing the Clinton impeachment proceedings.<sup>121</sup> The early post-impeachment polling suggests the Republican party will suffer because Americans twice elected Clinton as President, in spite of his character flaws, and were not happy with a partisan Republican effort to second-guess its political judgment.<sup>122</sup>

Professor Gerhardt believes that the legitimacy of a presidential impeachment turns on the judgment of history.<sup>123</sup> While it may be true that history will decide whether an impeachment is legitimate, the popular political compass of the people will decide whether the impeachment is successful. In the immediate analysis, the critical question about a presidential impeachment is structural implications for respecting the Democratic political compass of the people to elect the President. It is true that presidential impeachment decisions directly implicate structural separation of power issues.<sup>124</sup> Under a separation of power analysis, Congress' use of the impeachment power is limited by its perception of the popular political compass. In a presidential impeachment proceeding, the popular political compass outside of Congress serves as an additional check to the House and Senate conduct. I believe the Framers of the Constitution intended for the influence of the press to be an additional check on Congress' impeachment powers.<sup>125</sup> It was

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119. *Id.*

120. *Id.* at 18A.

121. *Id.*

122. *Id.* "Rep. Henry Hyde of Illinois, Chief House Manager of the case against Clinton, recalled Friday, how the Republican legislator-prosecutor kept hoping the public would move from what he described as 'indifference' toward Clinton's action toward outrage." *Id.*

123. Gerhardt, *supra* note 69, at 907.

124. *Id.*

125. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975). According to Justice Stewart, the authors of the Constitution intended for the press to "create a fourth institution outside the government as an additional check to the three official branches." *Id.*; Richard L. Berke & Janet Elder, *Keep Clinton in Office*,

the press that informed both America and Congress that popular opinion was against impeaching the President.<sup>126</sup>

#### IV. CLINTON'S IMPEACHMENT LEGACY IS THE EXPANSIVE INTERPRETATION GIVEN IMPEACHABLE OFFENSES UNDER THE "OTHER HIGH CRIMES AND MISDEMEANORS" LANGUAGE OF THE CONSTITUTION

According to Professor Gerhardt, the drafters of the United States Constitution did a remarkable job of separating American impeachment law from the British in eight ways.<sup>127</sup> First, in America, impeachment only applies to "[t]he President, Vice President and all civil officers of the United States."<sup>128</sup> Second, in England, anyone could be impeached, with the exception of royal family members.<sup>129</sup> Third, the American Constitution attempted to narrow the scope of impeachable offenses to "treason, bribery or other high crimes or misdemeanors."<sup>130</sup> Fourth, the British took a very expansive view of what constituted an impeachable offense as compared to the more narrowly-tailored American version of im-

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*Most Say in Poll, But Support is Eroding*, N.Y. TIMES, Sept. 16, 1998, at A1 (citing New York Times/CBS News poll conducted Aug. 17, 1998).

126. Alter, *supra* note 99, at 31-32.

For the traditional news media, that light at the end of the Lewinsky tunnel is an oncoming train. New technologies are bearing down at high speed on the old engines of information. This scandal may be remembered as the moment at which the status quo in the news business finally crashed and burned .... The Lewinsky story also marks the journey of rumor and innuendo to the center of the media universe. In fact, the first word of the President's affair with the intern broke when Drudge used his Web site to convey a rumor he heard about *Newsweek's* working on the story .... [B]ut *Newsweek* didn't have enough confirmation to publish it yet. In that case, the purloined scoop was partly accurate. Many other rumors-like the semen-stained dress - have also turned out to be true .... While Clinton critics lost their struggle in the country as a whole, they won on the Web. If "old media" were often seen as liberal, "new media" are materializing as conservative and libertarian. The next big political crisis might see the Internet and cable culture leading the public opinion rather than railing against it.

*Id.*

127. Gerhardt, *supra* note 69, at 908.

128. U.S. CONST. art. II, § 4.

129. Gerhardt, *supra* note 69, at 908 (citing 15 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1061, 1064 (David S. Garland & Lucius P. McGehee eds., 1900) [hereinafter AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW]).

130. U.S. CONST. art. II, § 4.

peachment.<sup>131</sup> Fifth, in England, the House of Lords only needed a majority to convict.<sup>132</sup> Sixth, in America, the impeachment trial is conducted in the Senate and “no person shall be convicted without the concurrence of two-thirds of the members present.”<sup>133</sup> Seventh, under the British system, the House of Lords had total discretion on punishment upon conviction.<sup>134</sup> Eighth, in the United States, the impeachment punishment is limited to “removal from office, and disqualification to hold and enjoy any office or honor, trust or profit under the United States ....”<sup>135</sup> The King had the ability to pardon an impeachment conviction,<sup>136</sup> but the American Constitution prohibits the President from granting an impeachment conviction pardon.<sup>137</sup> The United States Constitution provides that the President may be impeached,<sup>138</sup> but the King in England is not subject to the impeachment process.<sup>139</sup> The English treated impeachment proceedings as criminal proceedings while the American Constitution distinguishes between impeachment proceedings and criminal proceedings.<sup>140</sup> In Britain, there were many methods to impeach judges, but under the Constitution, impeachment is the only process available for presidential removal.<sup>141</sup> I believe the words “high crimes or misdemeanors,” for purposes of presidential impeachment, mean whatever the requisite majority in Congress want them to mean. Professor Gerhardt cautions that these terms must be considered in their historical, constitutional context.<sup>142</sup>

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131. AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, *supra* note 129, at 1066.

132. *Id.* at 1071.

133. U.S. CONST. art. I, § 3, cl. 6.

134. AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, *supra* note 129, at 1072.

135. U.S. CONST. art. I, § 3, cl. 7.

136. AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, *supra* note 129, at 1072.

137. U.S. CONST. art. II, § 2, cl. 1.

138. *Id.* § 4.

139. AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, *supra* note 129, at 1062.

140. Gerhardt, *supra* note 2, at 23.

141. See generally MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 82-102 (1996).

142. Gerhardt, *supra* note 69, at 909.

Of these distinctive features, the one of greatest contemporary concern is the founders' choice of the words—"treason, bribery, and other high crimes or misdemeanors"—for delineating and narrowing the scope of the federal impeachment process. The founders did not discuss the meaning of "other high crimes or misdemeanors" extensively, certainly not in any way that definitively resolves the precise meanings of those terms. Nevertheless, the context and content of the founders' principal discussions about the phrase "other high crimes or misdemeanors" pro-

Professor Gerhardt takes the position that the founders of the Constitution intentionally made a decision to loosely define the terms “other high crimes and misdemeanors” for purposes of impeachable offenses.<sup>143</sup> The founders discussed the terms “high crimes and misdemeanors” extensively, and most likely anticipated the cases that would arise in impeachment proceedings.<sup>144</sup> By agreeing to make other high crimes or misdemeanors the basis for an impeachable offense, the founders chose terms of art to describe offenses that would actually develop their substantive content in the future on a case-by-case basis.<sup>145</sup>

Most commentators examining the constitutional terms of art “other high crimes or misdemeanors” have concluded that these terms refer to political crimes.<sup>146</sup> By allowing the terms “other high crimes or misdemeanors” to be developed on a case by case basis, contemporary impeachment proceedings on a de facto basis have been granted expanded constitutional jurisdiction to define what constitutes an impeachable offense. This expanded constitutional common law to decide impeachable offenses on a case-by-case basis in fact resembles the early English Parliament’s unconstrained and expansive jurisdiction to define impeachable offenses.<sup>147</sup> This expansive power to define a substantive impeachment is in spite of the founders’ attempt not to follow the British precedent of an ex-

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vide an important backdrop to contemporary efforts to understand the meaning of the phrase.

*Id.*

143. *Id.* at 913.

144. *Id.*

145. *Id.*

146. *Id.* at 930 & nn.49-61 (citing RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 58 (1974); CHARLES L. BLACK JR., *IMPEACHMENT: A HANDBOOK* 35, 39-40 (1974); GEORGE T. CURTIS, *CONSTITUTIONAL HISTORY OF THE UNITED STATES* 260-61 (1974); PETER HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA 1635-1805* (1984); CHARLES E. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 19 (1928); JOSEPH STORY, 2 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 269-87 (1987); 1 JAMES WILSON, *LECTURES ON THE LAW, NO. 11, COMPARISON OF THE CONSTITUTION OF THE UNITED STATES WITH THAT OF GREAT BRITAIN*, *THE WORKS OF JAMES WILSON* 382, 408 (Robert McCloskey ed., 1987); Arthur Bestor, *Impeachment*, 49 WASH. L. REV. 255, 264-66 (1973) (reviewing RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1974); John Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 47-58 (1970); Paul S. Fenton, *The Scope of the Impeachment Power*, 65 NW. U. L. REV. 719, 726 (1971), Arthur J. Goldberg, *The Question of Impeachment*, 1 HASTINGS CONST. L.Q. 5, 6 (1974)

147. AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, *supra* note 129, at 1066.

pansive definition of an impeachable offense.<sup>148</sup> The delegates to the Constitutional Convention tried to narrow the scope of the impeachable offenses to high crimes or misdemeanors.<sup>149</sup> As a practical matter, there is no real limit to the terms "high crimes or misdemeanors" or "political crime" in the impeachment proceedings. An impeachable offense is only limited by rational dictates of members of Congress driven by the popular political compass of the people. In the absence of treason or bribery, an impeachable offense is a term loosely defined by the contemporary political climate with a generic reference to the constitutional language of "other high crimes or misdemeanors."<sup>150</sup>

#### V. CONGRESS' POLITICAL COMPASS AS DRIVEN BY SELF-INTEREST DETERMINES THE FATE OF AN IMPEACHMENT PROCEEDING

From a historical perspective, the basis for an impeachable offense consisted of an injury to the State.<sup>151</sup> On the present American political scene, an impeachable offense which only injures the State and does not do great harm to the American political compass may be sufficient to constitute an impeachable offense, but it is clearly unlikely to serve as a basis for a conviction on the offense.<sup>152</sup> On January 5, 1999, two weeks after the House impeached President Clinton, Republican Senator Strom Thurmond of South Carolina said it takes two-thirds votes to convict the President of an impeachable offense, "We don't have it. Let's get it over."<sup>153</sup> After the Lewinsky scandal broke, President Clinton chose to go to war rather than sue for peace in his battle against those who wanted to remove him from office.<sup>154</sup> The President's political and legal advisors cleverly demonized prosecutor Ken Starr while playing to public opinion with successful arguments that this investigation and subsequent impeachment proceeding "was about sex, not constitutional substance."<sup>155</sup> In the end, the President was spared an im-

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148. Gerhardt, *supra* note 69, at 908.

149. *Id.*

150. U.S. CONST. art. I, § 4.

151. Bestor, *supra* note 146, at 264.

152. Evan Thomas, *Why Clinton Won: What Saved the President at Trial? An Intriguing Mix of Polls, Senatorial Pride and, as Usual, the Excesses of His Enemies. The Inside Story of Clinton's Acquittal*, NEWSWEEK, Feb. 22, 1999, at 24.

153. *Id.*

154. *Id.*

155. *Id.* at 25-26.

peachment conviction because of senatorial high-mindedness and back-room dealing.<sup>156</sup> Many senators thought that the impeachment vote in the House was a spectacle not to be repeated.<sup>157</sup> The senators had read the polls and were not interested in reviewing Clinton's sex life in order to convict him of impeachable offenses.<sup>158</sup>

In escaping an impeachment conviction, Clinton had once again outlasted his political enemies.<sup>159</sup> President Clinton realized that the political impeachment proceedings were a game of comparison.<sup>160</sup> Compared "to Ken Starr, Linda Tripp and the [Republican] House managers, [the President] was, by far, [a] lesser evil in the eyes of most Americans."<sup>161</sup> At the end of the impeachment proceedings, the President had an approval rating of sixty-six percent, according to a *Newsweek* poll.<sup>162</sup> President Clinton was not convicted of an impeachable offense because the political compass, driven by polls provided for by our constitutional structure, informed leaders of the Senate that its political self-interest and pride would be served by not removing President Clinton from office.<sup>163</sup> Two weeks after the House impeached President Clinton, four Republican Senators and four Democratic Senators met privately in Senate Majority Leader Trent Lott's office.<sup>164</sup> The purpose of the meeting with Lott was to lay careful groundwork that would promote the dignity of the Senate in the impeachment proceedings and virtually assure that Clinton would not be convicted.<sup>165</sup>

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156. *Id.* at 26.

For some years now, Senate old-timers have been quietly muttering about a loss of civility and collegiality in their chamber. They blamed TV cameras and an influx of bomb throwers from the House. To the traditionalists, the impeachment vote in the House was a spectacle not to be repeated. The dignity of the upper house was at stake. The senators had read the polls and weren't interested in rummaging through Clinton's sex life. The best strategy: preserve institutional pride and get it over with fast.

*Id.*

157. *Id.*

158. *Id.*

159. Howard Fineman, *The Survivor*, NEWSWEEK, Feb. 22, 1999, at 20, 23.

160. *Id.* at 23.

161. *Id.*

162. *Id.*

163. Thomas, *supra* note 152, at 25.

164. *Id.*

165. *Id.*

After the meeting with Lott, the Senate took its first vote of the impeachment proceeding.<sup>166</sup> The Senate voted 100 to zero to adopt procedural rules for the trial.<sup>167</sup> The day before the ground-rule vote, Lott announced he would visit the House Managers.<sup>168</sup> "Lott was already suspect to the House Managers—a little too slick, too willing to make deals."<sup>169</sup> At that meeting, Lott told the House Managers that the Senate would never permit a normal trial because of the Democrats.<sup>170</sup> The meeting with Lott made three Republican House Managers, Chris Cannon, Lindsey Graham and Jim Rogan angry enough to threaten not to participate in the impeachment trial.<sup>171</sup> "I won't participate in any sham trial," Rogan said.<sup>172</sup>

The Senate took a vote on the number of witnesses to participate at the trial.<sup>173</sup> The House managers would have to make their case against the President before the Senate with the videotaped depositions of three witnesses and not a single live witness.<sup>174</sup> The key vote on witnesses was taken along partisan party lines and the "talking heads immediately proclaimed partisan warfare."<sup>175</sup> The witness vote did not represent partisan warfare but an alliance of bipartisan convenience because of the behind-the-scenes, joint effort of Lott and Daschle.<sup>176</sup> Both Lott and Daschle were committed to a "short, dignified, impeachment trial."<sup>177</sup> For Daschle, the vote to limit witnesses represented a short trial and an opportunity to save his fellow Democrat, President Clinton, from being the first

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166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 30.

174. *Id.*

175. *Id.*

176. *Id.*

Daschle and Lott were forging an alliance of convenience. Lott and Daschle are opposites: Lott is a former Ole Miss cheerleader, Daschle cerebral and introverted. Neither man really likes the other. They had squabbled so openly last year that Democrat Patrick Leahy of Vermont had pleaded with both men to make peace for the sake of the institution.

*Id.*

177. *Id.*

president to ever be convicted of an impeachable offense.<sup>178</sup> The vote on witnesses and short impeachment trial presented Lott with an opportunity to rescue the Republican Party from deeper disaster brought on by the unpopular Clinton impeachment proceedings.<sup>179</sup> Clinton avoided conviction in the impeachment proceedings because the political self-interest of the Senate, as an institution, deemed it necessary and proper to acquit him on charges of lying to cover up a series of sex scandals. The Senate followed the political compass that said the public was very forgiving of a married man with a family lying to cover up his sexual misconduct, even if that man happens to be the President of the United States.

The popular law of impeachment is more conclusive than constitutional law on whether impeachment proceedings are warranted.<sup>180</sup> "By popular law ... [Professor Pious] mean[s] the responses given by the American people in public opinion surveys involving the grounds on which impeachment proceedings are warranted."<sup>181</sup> I believe the law of presidential impeachment is actually the political compass that compels Congress not to remove an elected President from office if there is any rational basis to believe that the President enjoys substantial support from the public and his or her political party. The political compass of members of Congress places a great deal of emphasis in projected self-interest electoral outcomes in trying to decide whether impeachment proceedings should be instituted against the President. Professor Pious asserts the popular law of impeachment values electoral outcomes over narrow legalism, with a potentially higher standard for an impeachable offense than the indictable offense standard.<sup>182</sup>

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178. *Id.*

179. *Id.*

Lott has to tread carefully with the twenty-odd right-wing senators who kept talking about the party's "base"—the conservative true believers who turn out at election time. The "base," these senators argued, wanted to see a full-scale trial. Lott smiled and listened to the right-wingers, but he quietly did business with Daschle. He gave the Democratic leader a veto over calling more witnesses or expanding the scope of the trial.

*Id.*

180. Pious, *supra* note 32, at 892.

181. *Id.*

182. *Id.* at 893.

The popular law values electoral outcomes over narrow legalisms, thus raising the impeachment bar much higher than the "indictable crime" standard. Consider the structure of public opinion in the early months of the Watergate scandal: a poll taken in a major Midwestern metropoli-



The popular law of impeachment theory is actually a political compass driven by opinion polls, which may either raise the bar or lower the bar for an impeachable offense because the political compass is guided by the political self-interest of Congress.<sup>183</sup> In the

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tan area in September 1973 indicated that a majority of respondents believed Nixon was involved in Watergate crimes, but a majority did not want Nixon to resign or the House to impeach him. One-third of the respondents thought Nixon was guilty but didn't want to see him leave office. At the time of this survey, Nixon's Gallup Poll approval ratings were in the thirty-five percent range, soon to move to twenty-seven percent, inflation and unemployment were high, and the market was in the doldrums. The key factor was the desire of voters to continue the man they had voted for in office: a vote for Nixon in 1972 correlated closely with a desire not to see him resign or be removed from office, in spite of low approval ratings. It takes a lot more than a scandal, a poor economy, or an allegation of a criminal offense to get a majority of the electorate to abandon an elected president. Although steadily rising, support for Nixon's removal or resignation did not go over the fifty percent mark in national surveys until January 1974, after the Saturday Night Massacre, and after Vice President Agnew had resigned from office. By the time of Nixon's resignation, almost one-fourth of the electorate still did not think that he should leave office or be removed from it.

*Id.* at 893-94 (citations omitted).

183. Thomas & Hosenball, *supra* note 104, at 22.

Behind the scenes, it's not about removing the President anymore. It's about saving face, dishing dirt and posturing for history .... The sham quality to the endgame was exposed by the Senate's failure to call Betty Currie as a witness. In any court of law, Currie's testimony would be crucial to making a case against Clinton of obstruction of justice. Currie's statements to the FBI and her grand-jury testimony suggest that the President coached his secretary to lie about his relationship with Monica Lewinsky. But in her several appearances before the grand jury, Currie was all over the map, failing to remember events that she once easily recalled. The Republican managers argued, unconvincingly, that Currie's testimony had been clear enough. But the real reason she was not able to re-enact what some GOP senators call "The Scene ...." A majority of the Republican senators are fairly hard-line conservatives. Led by Don Nickles of Oklahoma and Phil Gramm of Texas, they have been pressing for a full trial in the Senate, witnesses and all. They argue that the base—the right-wing true believers who reliably turn out to vote on Election Day—want to see Clinton disgraced, even if he can't be thrown out. The more testimony about the President's moral failings, the better. Republican moderates, however, worry about a backlash that the GOP will be forever identified as the scandal-obsessed Impeachment Party. Lott is somewhere in between: a conservative, but also a deal-maker. His delicate maneuvering was revealed by the Senate's vote last week on witnesses. On the surface, it appeared that the GOP had simply rolled over the Democrats. The TV commentators immediately proclaimed a fierce partisan clash. So why, then, were Lott and Minority Leader Tom Daschle smiling and joking on the Senate floor? Because, on close inspection,

House, a majority of Congressmen, led by the Republicans, read the political compass as indicating that the President had committed an impeachable offense. The impeachment political compass directing the House of Representatives lost its way in the Senate. In the Senate trial, the political compass of self-interest failed to deliver a simple majority vote to convict the President.<sup>184</sup> During the course of the trial, many Republican senators began to realize that the unpopular impeachment proceedings gave the Democrats a political advantage.<sup>185</sup> A *Newsweek* poll, shortly before the impeachment vote in the Senate, indicated that even Republicans believed that they were taking a negative hit for leading the impeachment proceedings against the President.<sup>186</sup>

## VI. CONCLUSION

It is almost impossible to understand how President Clinton could gain in approval ratings at a time when a majority of Americans believe that the President has personal character flaws on issues of sex and morality.<sup>187</sup> I believe the President's approval ratings went up because the public believed the President's bad behavior was less objectionable than that of a handful of determined enemies of the President.<sup>188</sup> These enemies included a net-

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the rules were rigged to keep the trial from getting out of control. The vote to call witnesses gave Lott credibility with his right flank. At the same time, Daschle was given an absolute veto on calling any new prosecution witnesses. The center held, at least for the time being.

*Id.* at 22-25.

184. Thomas, *supra* note 152, at 26.

With five Republicans (all Northeastern moderates) voting to acquit, the Democrats had a shot at blocking even a simple majority to convict on both perjury and obstruction of justice. Byrd was the swing vote .... Not until a few minutes before the vote did anxious White House lawyers learn Byrd's intentions. He would vote to acquit.

*Id.* at 31.

185. Alter, *supra* note 99, at 31.

186. *Id.*

187. Pious, *supra* note 32, at 902.

188. Michael Isikoff, *The Right Wing Web*, NEWSWEEK, Feb. 22, 1999, at 32.

Busy elves. Who were these lawyers? What were they doing? It would take me eighteen months to piece together and confirm the important role they played in the Lewinsky affair. As I reported on the story in 1997 and into 1998, I got hints that some conservative lawyers were working behind the scenes. And *Newsweek* did report the outlines of their activity as early as the first weeks of the scandal .... Although the conspirators were conservative, they were not the "vast" group that Hillary Clinton suspected

work of conservative lawyers called "busy elves" that assisted Paula Jones in her sexual harassment suit as well as helped Linda Tripp tell Kenneth Starr about Monica Lewinsky's sexual relationship with the President.<sup>189</sup> At the impeachment trial, fifty percent of the Senate followed the self-interest political compass directive by accommodating American public sentiment that the President's enemies and distracters acted in bad faith by not respecting the Presidency as an institution and violating Clinton's sexual privacy as a person.<sup>190</sup> The American public wants the prosecutor and the media to respect a zone of privacy for the President.<sup>191</sup> Clinton survived the impeachment process because of a public perception that his presidency received unfair treatment by bitter partisans both in and out of Congress.<sup>192</sup> The Senate read the political compass tea

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.... The story begins in Little Rock with a lawyer named Cliff Jackson. One of Clinton's bitter foes, Jackson had been unearthing secrets of Clinton's for years. In 1994, the work paid off. He persuaded journalist Bill Rempel of the Los Angeles Times and David Brock of the American Spectator to investigate allegations that Clinton, while Governor, had used state troopers to procure women. When Paula Jones recognized herself as one of the women in Brock's piece, she wanted to file suit against the President—to regain her good name, she said. Jackson was eager to get her the best attorneys. Gerry Spence wasn't interested. Neither was Anita Hill. The National Organization for Women responded with a form letter and a kit on how to file a lawsuit .... No incumbent president had ever been sued for things he'd done before taking office. Was the case constitutional? It was up to the Supreme Court to decide. Ready for their argument for the high court, Jones' lawyers were befriended by none other than Kenneth Starr, then in private practice. The former appellate judge believed the case had merit and counseled them to move forward. Starr and Davis spoke a half-dozen times for a total of four-and-a-half hours in June 1994, discussing ways the Jones attorneys could undercut the President's claims of immunity. Starr's help ended there. In August 1994 he was named independent counsel and cut off contact with Davis. By then, however, elves had enlisted the help of another conservative lawyer - a brilliant young litigator named George Conway.

*Id.* at 32-33.

189. *Id.*

190. L. Darnell Weeden, *Protecting the President's Limited Expectation of Privacy During an Investigation May Justify the Protective Function Privilege for the Secret Service*, 60 MONT. L. REV. 109, 138 (1999). "The common law justification for a privacy based protective function privilege is supported by the tradition of Warren and Brandeis, that all individuals including the President shall benefit from a privacy principle as old as the common law." *Id.*

191. Pious, *supra* note 32, at 902.

192. L. Darnell Weeden, *The President and Mrs. Jones Were in Federal Court: The Litigation Established No Constitutional Immunity for President Clinton*, 7 GEO. MASON L. REV. 361, 378 (1999).

leaves and concluded that the President's inappropriate sexual behavior did not merit conviction and removal from office. Professor Pious feared that if the Republican-led impeachment proceedings produced an impeachable offense on the basis of partisan opinion, as opposed to popular opinion, such a result could lead to a constitutional crisis and a political backlash.<sup>193</sup> The constitutional structure of the electoral Democratic political compass creates enough inherent self-interest tension among voters, the legislative, executive and the judicial branch to ensure that it is almost impossible to remove a President from office under constitutional procedure without substantial majority support. A constitutional crisis was avoided simply because the political compass inherent in our constitutional structure indicated to the Senate that Congress would suffer a serious political backlash if the President, elected by the people, was removed from office. Throughout the Clinton impeachment proceedings, the American Constitution and its common law tradition for establishing an impeachable offense served the American people well.

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[O]n a functional level, courts should be able to grant a sitting president temporary immunity from sensationalized private litigation, which negatively impacts the Office of the President. The saga involving President Clinton and Paula Jones demonstrates that the government can continue to function while the President is unduly distracted by private litigation. But respect for the Presidency, as an institution under Article II, is severely undermined by private litigation against a sitting president.

*Id.*

193. Pious, *supra* note 32, at 904.

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